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9 Attorneys for Defendant  
10 THOMAS J. TOMANEK

11 IN THE UNITED STATES DISTRICT COURT  
12  
13 NORTHERN DISTRICT OF CALIFORNIA  
14

15 EDITH MACIAS, individually and on behalf  
16 of similarly situated individuals; HOTON  
17 DURAN; TIFFANY HUYNH; AURA  
18 MENDIETA; WILLIAM LABOY; MIGUEL  
19 ACOSTA; CRUZ ACOSTA; CUAUHTEMOC  
20 TORAL; and TERESA VILLEGAS, KAPIKA  
21 SALAMBUE and MARINA DURAN

22 Plaintiffs,

23 vs.

24 THOMAS J. TOMANEK; and MARK  
25 GARIBALDI, individually and doing business  
as THE GARIBALDI COMPANY,

Defendants.

Case No.: C07 3437 JSW

**NOTICE OF MOTION AND MOTION  
FOR EXPANSION OF RECORD [L.R.  
RULE 72.3 (b)]**

JUDGE: Hon. Jeffrey S. White



MEMORANDUM OF POINTS AND AUTHORITIES

At the time a party files an objection or response to the R&R, the party may make a motion for expansion or addition to the record of the proceedings before the magistrate judge or for an evidentiary hearing. Civil Local Rule 72-3 (b).

The cases cited below pertain to the R&R's conclusion that the statutory interpretation of Civil Code section 1717 observed in *In re Baroff*, 105 F.3d 439 (9<sup>th</sup> Cir. 1997) that California courts liberally construe "on a contract" should not be followed here (Doc. 62, R&R, 2:28-3:1-13). Tomanek cites these cases now in support of his argument that *In re Baroff* remains good law and that the liberal statutory interpretation to which it refers has been applied in cases subsequent to *Santisas v. Goodin* (1998) 17 Cal.4<sup>th</sup> 599 and in support of his argument that the bankruptcy appellate opinion, *In re Davison*, 289 B.A.P. 716, on which the R&R relies in reaching its conclusion, is not binding on the district courts.

Additional Case Law Authority:

1. *Bank of Maui v. Estate Analysis, Inc.* 904 F.2d 470, 472 (9<sup>th</sup> Cir. 1989)
2. *California Wholesale Material Supply, Inc. v. Norm Wilson & Sons, Inc.* (2002) 96 Cal.App.4<sup>th</sup> 598
3. *In re Fobian*, 951 F. 2d 1149 (C.A.9 1991)
4. *Mitchell Land v. Ferrantelli* (2007) 158 Cal.App.4<sup>th</sup> 479
5. *Travelers Casualty and Surety Co. of America v. Pacific Gas & Electric* \_\_\_ U.S. \_\_\_ (2007), 127 S. Ct. 1199, 167 L.Ed.2d 178

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1 Additional Evidence:

2 The evidence of the state court complaint pertains to Tomanek's Objection No. 5 to the  
 3 R&R and demonstrates that plaintiffs have not re-filed three of the claims brought originally in  
 4 this action. The R&R found that plaintiffs have "re-filed their breach of contract and tort claims  
 5 in state court." (Doc. 62, R&R, 3:17-18) The Reply Brief submitted by Tomanek referred to the  
 6 state court complaint to show the state court causes of action brought by plaintiffs. (Doc. 54, p.  
 7 11) The caption page only, however, was attached as Exhibit 1 to plaintiffs' opposition to the  
 8 underlying motion without including the entirety of the complaint (Doc. 44, p. 30). A true and  
 9 correct copy of the entire state complaint is attached hereto as Exhibit "A" and the court is  
 10 requested to take judicial notice of its filing. Fed. R. Evid. 201(b)(2).

12 CONCLUSION

13 For all the foregoing reasons, it is submitted that good cause exists to expand the record  
 14 and it is respectfully requested that the Court grant the within motion to expand the record to  
 15 include the case law and evidence cited above.  
 16

17  
 18 Respectfully Submitted,

19 Dated: March 25, 2008

ALLMAN & NIELSEN, P. C.

20  
 21 By: /s/ Sara B. Allman  
 22 Sara B. Allman, Esq.  
 23 Attorneys for Defendant  
 24 THOMAS J. TOMANEK  
 25

PROOF OF SERVICE

I am a citizen of the United States and employed in Marin County, California. I am over the age of eighteen years and not a party to the within action. My business address is 100 Larkspur Landing Circle, Suite 212, Larkspur, California 94939-1743.

On this date I served the foregoing documents described as:

**NOTICE OF MOTION AND MOTION FOR EXPANSION OF RECORD  
[L.R. RULE 72.3 (b)]**

on the interested parties in the action by placing ☐ the original ☒ a true copy thereof, enclosed in a sealed envelope addressed as follows:

Christopher Brancart Elizabeth Brancart BRANCART & BRANCART PO Box 686 Pescadero, CA 94060 Telephone: (650) 879-0141 Facsimile: (650) 879-1103 <a href="mailto:ebrancart@brancart.com">ebrancart@brancart.com</a> <a href="mailto:cbrancart@brancart.com">cbrancart@brancart.com</a>	Attorney for Plaintiffs EDITH MACIAS, individually and on behalf of similarly situated individuals; HOTON DURAN; TIFFANY HUYNH; AURA MENDIETA; WILLIAM LABOY; MIGUEL ACOSTA; CRUZ ACOSTA; CUAUHTEMOC TORAL; and TERESA VILLEGAS
John S. Blackman Farbstein & Blackman 411 Borel Ave #425 San Mateo, CA 94402-3518 (650) 554-6200 Fax Number (650) 554-6240	Attorneys for Defendant MARK GARIBALDI, individually and doing business as THE GARIBALDI COMPANY
Carl D. Ciochon Wendel Rosen Black & Dean, LLP 1111 Broadway, 24 <sup>th</sup> Floor Oakland, CA 94607	Attorneys for Defendant MARK GARIBALDI, individually and doing business as THE GARIBALDI COMPANY

☒ BY MAIL: I deposited such envelope with postage thereon fully prepaid in the United States Postal Service mailbox at Larkspur, California.

☐ BY PERSONAL SERVICE: I delivered such envelope by hand to the addressee.

☐ BY FACSIMILE: I sent such document via facsimile to the facsimile machine of the addressee.

1 [ ] BY EXPRESS MAIL: I deposited such envelope in a mailbox regularly maintained  
2 by the United States Postal Service for receipt of Express Mail postage paid to be  
delivered by Express Mail for overnight courier service to the addressee.

3 [ ] BY OVERNIGHT DELIVERY: I deposited the envelope, in an envelope designated  
4 by the express service carrier, with delivery fees provided for, in a box regularly  
maintained by the express service carrier for overnight delivery.

5 I declare under penalty of perjury under the laws of the State of California that the  
foregoing is true and correct to the best of my knowledge.

6 Executed on March 25, 2008, at Larkspur, California.

7   
8 \_\_\_\_\_  
NOLI VILLA

**Exhibit “A”**

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1 BRANCART & BRANCART  
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14 Attorneys for Plaintiffs

**FILED**  
**ALAMEDA COUNTY**

JAN 17 2008

CLERK OF THE SUPERIOR COURT  
 B. *Christa Baker*  
 Deputy

**SUMMONS ISSUED**

**SUPERIOR COURT OF CALIFORNIA**

**COUNTY OF ALAMEDA**

12 EDITH MACIAS, individually and on  
 13 behalf of similarly situated  
 14 individuals; HOTON DURAN;  
 15 TIFFANY HUYNH; AURA MENDIETA;  
 16 WILLIAM LABOY; MIGUEL ACOSTA;  
 17 CRUZ ACOSTA; CUAUHEMOC  
 18 TORAL; TERESA VILLEGAS,  
 19 KAPIKA SALAMBUE; and MARINA  
 20 DURAN,

21 Plaintiffs,

22 vs.

23 THOMAS J. TOMANEK; and  
 24 MARK GARIBALDI, individually  
 25 and doing business as THE  
 26 GARIBALDI COMPANY,

27 Defendants.

Case No. **08366602**

**CLASS ACTION COMPLAINT FOR  
 DAMAGES AND INJUNCTIVE RELIEF**

- 1) Violation of CC § 1950.5
- 2) Violation of B&P Code § 17200
- 3) Fraud
- 4) Unjust Enrichment
- 5) Defamation

**JURY TRIAL DEMANDED**

**[CLASS ACTION]**

**BY FAX**

**I. INTRODUCTION**

1. In this action, plaintiffs, former tenants of the Rancho Luna & Rancho Sol Apartments, a large rental complex located in Fremont, California, claim that defendant Thomas J. Tomanek and defendant Mark Garibaldi, doing business as The Garibaldi Company, have engaged in unlawful and unfair business practices in the operation and

**CLASS ACTION COMPLAINT FOR DAMAGES AND  
 INJUNCTIVE RELIEF**

1 management of the Rancho Luna & Sol Apartments in violation of California Business &  
2 Professions Code § 17200, et seq., Civil Code §1950.5, and the general common law,  
3 by improperly charging vacating tenants for the ordinary wear and tear in their units;  
4 retaining tenants' security deposits and demanding additional payments for alleged  
5 property damage upon move-out. The class representative plaintiff brings this action  
6 on behalf of herself and similarly situated individuals.

7 **II. JURISDICTION AND VENUE**

8 2. This court has jurisdiction over plaintiffs' claims under Civil Code § 1950.2  
9 and Business & Professions Code §§ 17203 and 17204.

10 3. Venue is proper in Alameda County and this judicial district pursuant to  
11 Code of Civil Procedure § 395(a). Plaintiffs are informed and believe that at least one  
12 defendant, Thomas J. Tomanek, is a resident of Alameda County.

13 **III. PARTIES**

14 4. Plaintiffs Edith Macias and Hoton Duran resided in apartment 246 in the  
15 Rancho Luna section of the Rancho Luna & Rancho Sol Apartments between  
16 November 1, 2004 and November 1, 2005. Plaintiff Edith Macias brings this suit on  
17 behalf of herself and a class of similarly situated individuals.

18 5. Plaintiff Tiffany Huynh resided in apartment 115 in the Rancho Sol section  
19 of the Rancho Luna & Rancho Sol Apartments between July 27, 2002, and October 3,  
20 2005.

21 6. Plaintiff Aura Mendieta resided in apartment 104 in the Rancho Luna  
22 section of the Rancho Luna & Rancho Sol Apartments between October 19, 2002, and  
23 October 31, 2005.

24 7. Plaintiff William Laboy resided in apartment 108 in the Rancho Sol section  
25 of the Rancho Luna & Rancho Sol Apartments between March 30, 2004, and April 1,  
26 2005.

27 //

28 //

1           8.     Plaintiffs Miguel Acosta and Cruz Acosta resided in apartment 202 in the  
2 Rancho Luna section of the Rancho Luna & Rancho Sol Apartments between February  
3 23, 2002 and April 4, 2006.

4           9.     Plaintiffs Cuauhtemoc Toral and Teresa Villegas resided in apartment 205  
5 in the Rancho Luna section of the Rancho Luna & Rancho Sol Apartments between  
6 March 13, 2004, and March 30, 2005.

7           10.    Plaintiff Kapika Salambue resided in apartment 230 in the Rancho Luna  
8 section of the Rancho Luna & Rancho Sol Apartments between August 1, 2004, and  
9 August 13, 2005.

10          11.    Plaintiff Marina Duran resided in apartment 119 in the Rancho Luna  
11 section of the Rancho Luna & Rancho Sol Apartments between December 2001 and  
12 December 2005.

13          12.    Plaintiffs are informed and believe and thereon allege that defendant  
14 Thomas J. Tomanek owns the Rancho Luna & Rancho Sol Apartments and has done  
15 so at all times relevant herein.

16          13.    Plaintiffs are informed and believe and thereon allege that defendant Mark  
17 Garibaldi, doing business as The Garibaldi Company, acts as the property manager  
18 operating the Rancho Luna & Rancho Sol Apartments, and has done so at all times  
19 relevant herein, employed by defendant Thomas J. Tomanek as his managing agent.  
20 Defendant Mark Garibaldi, doing business as The Garibaldi Company employs agents  
21 to assist him in the operation of the Rancho Luna & Rancho Sol Apartments. As used  
22 herein, "The Garibaldi Company" refers to Mark Garibaldi, doing business as The  
23 Garibaldi Company.

24          14.    Plaintiffs are informed and believe and thereon allege that, at all times  
25 mentioned herein, each and every defendant is and was, in doing the things  
26 complained of herein, the agent of its co-defendants herein and was acting within the  
27 scope of said agency and/or representation, and that each and every defendant herein  
28

1 is jointly and severally responsible and liable to plaintiffs for the damages hereinafter  
2 alleged.

3 **IV. FACTS**

4 **A. INTRODUCTION**

5 15. Pursuant to California Civil Code § 1950.5(e), a landlord may claim from a  
6 tenant's security deposit only those amounts as are reasonably necessary (1) to  
7 compensate the landlord for a tenant's default in the payment of rent; (2) to repair  
8 damages to the premises, exclusive of ordinary wear and tear, caused by the tenant or  
9 by a guest or licensee of the tenant; (3) to clean the premises upon termination of the  
10 tenancy as necessary to return the unit to the same level of cleanliness it was in at the  
11 inception of the tenancy; or (4) to remedy future defaults by the tenant in any obligation  
12 under the rental agreement to restore, replace, or return personal property or  
13 appurtenances, exclusive of ordinary wear and tear, if the security deposit is authorized  
14 to be applied thereto by the rental agreement. A landlord "may not assert a claim  
15 against the tenant or the security for damages to the premises or any defective  
16 conditions that preexisted the tenancy, for ordinary wear and tear or the effects thereof,  
17 whether the wear and tear preexisted the tenancy or occurred during the tenancy, or for  
18 the cumulative effects of ordinary wear and tear occurring during any one or more  
19 tenancies." California Civil Code § 1950.5(e).

20 16. Defendants have engaged in a pattern or practice of wrongfully  
21 withholding the security deposits of vacating tenants as a method of funding  
22 renovations and updates to units that have suffered only ordinary wear and tear during  
23 the tenancy. Defendants unlawfully assert claims against tenants and their security  
24 deposits for alleged damages to units at the Rancho Luna & Rancho Sol Apartments  
25 that preexisted tenancy or consisted of ordinary wear and tear during the tenancy. This  
26 unlawful practice is generally applicable to defendants' former, current and future  
27 tenants as a class.

28 //

**B. EDITH MACIAS AND HOTON DURAN**

17. On October 21, 2004, plaintiffs Edith Macias and Hoton Duran entered into a written lease agreement with The Garibaldi Company at the Rancho Luna & Rancho Sol Apartments for rental of apartment 246 in the Rancho Luna section of the complex. Plaintiffs were assisted in the execution of the lease agreement by an individual, whom plaintiffs are informed and believe was an employee of The Garibaldi Company, who countersigned the lease agreement on behalf of The Garibaldi Company. Pursuant to the agreement, Ms. Macias and Mr. Duran paid \$1,700 as a security deposit before commencing their tenancy. Under the terms of the agreement, The Garibaldi Company agreed to return the \$1,700 security deposit by mail within three weeks of the tenants' vacating the unit, less any charges for damage to the premises, fixtures or furnishings, but not including charges for reasonable wear and tear. Pursuant to Civil Code § 1950.5(e), The Garibaldi Company was prohibited by law from assert a claim against the tenant or the security for damages to the premises or any defective conditions that preexisted the tenancy, for ordinary wear and tear or the effects thereof, whether the wear and tear preexisted the tenancy or occurred during the tenancy, or for the cumulative effects of ordinary wear and tear occurring during any one or more tenancies.

18. In giving The Garibaldi Company the \$1,700 security deposit, Ms. Macias and Mr. Duran reasonably relied on The Garibaldi Company to abide by its representations and the law, including California Civil Code § 1950.5(e), and not to charge them for reasonable wear and tear to the unit.

19. The representation of The Garibaldi Company in the lease agreement that it would not charge Ms. Macias and Mr. Duran for reasonable wear and tear to the unit was false, or made with reckless disregard to its falsity, because The Garibaldi Company intentionally followed a policy and practice of unlawfully charging vacating tenants for reasonable wear and tear to their unit.

1           20. On November 1, 2005, Ms. Macias and Mr. Duran vacated apartment  
2 246. Before vacating that apartment, Ms. Macias and Mr. Duran requested an initial  
3 inspection by defendants. The purpose of that inspection was to allow Ms. Macias and  
4 Mr. Duran the opportunity to remedy deficiencies identified by defendants in order to  
5 avoid deductions from his security deposit. But defendants failed or refused to conduct  
6 that inspection in accordance with California Civil Code § 1950.5(f)(1). At the time that  
7 Ms. Macias and Mr. Duran vacated apartment 246, that dwelling had been returned to  
8 the same condition, except for normal wear and tear, and same level of cleanliness as it  
9 was at the inception of their tenancy.

10           21. Nonetheless, defendants unlawfully, and acting in bad faith, charged  
11 \$2,818.75 for cleaning and damage to apartment 246, deducting that sum from the  
12 security deposit paid by Ms. Macias and Mr. Duran. Defendants retained, and continue  
13 to retain, the full amount of plaintiffs' security deposit. Because the charges exceed the  
14 amount of the security deposit, defendants claim that Ms. Macias and Mr. Duran owe  
15 defendants \$1,160.75. Defendants have sought to collect those unlawful charges from  
16 Ms. Macias and Mr. Duran through the use of a collection agency, T.A. Ross  
17 Collections. In July 2006, defendants placed the alleged debt with T.A. Ross  
18 Collections for attempted collection. Since that time, T.A. Ross Collections has made a  
19 report to the national credit reporting agencies regarding Ms. Macias, stating that the  
20 alleged debt is in collection, resulting in a negative mark on Ms. Macias' credit report.

21                           **C. TIFFANY HUYNH**

22           22. On July 27, 2002, plaintiff Tiffany Huynh entered into a written agreement  
23 with The Garibaldi Company at the Rancho Luna & Rancho Sol Apartments for rental of  
24 apartment 115 in the Rancho Sol section of the complex. Plaintiff was assisted in the  
25 execution of the lease agreement by an individual, whom plaintiff is informed and  
26 believes was an employee of The Garibaldi Company, who countersigned the lease  
27 agreement on behalf of The Garibaldi Company. Pursuant to that agreement, Ms.  
28 Huynh paid \$400 as a security deposit before commencing her tenancy. Under the

1 terms of the agreement, The Garibaldi Company agreed to return the \$400 security  
2 deposit by mail within three weeks of the tenants' vacating the unit, less any charges for  
3 damage to the premises, fixtures or furnishings, but not including charges for  
4 reasonable wear and tear. Pursuant to Civil Code § 1950.5(e), The Garibaldi Company  
5 was prohibited by law from assert a claim against the tenant or the security for  
6 damages to the premises or any defective conditions that preexisted the tenancy, for  
7 ordinary wear and tear or the effects thereof, whether the wear and tear preexisted the  
8 tenancy or occurred during the tenancy, or for the cumulative effects of ordinary wear  
9 and tear occurring during any one or more tenancies.

10 23. In giving The Garibaldi Company the \$400 security deposit, Ms. Huynh  
11 reasonably relied on The Garibaldi Company to abide by its representations and the  
12 law, including California Civil Code § 1950.5(e), and not to charge her for reasonable  
13 wear and tear to the unit.

14 24. The representation of The Garibaldi Company in the lease agreement  
15 that it would not charge Ms. Huynh for reasonable wear and tear to the unit was false,  
16 or made with reckless disregard to its falsity, because The Garibaldi Company  
17 intentionally followed a policy and practice of unlawfully charging vacating tenants for  
18 reasonable wear and tear to their unit.

19 25. On October 3, 2005, Ms. Huynh vacated apartment 115. At the time that  
20 Ms. Huynh vacated apartment 115, that dwelling had been returned to the same  
21 condition, except for normal wear and tear, and same level of cleanliness as it was at  
22 the inception of her tenancy.

23 26. Nonetheless, defendants unlawfully, and acting in bad faith, charged  
24 \$452.04 for cleaning and damage to apartment 115, deducting that sum from Ms.  
25 Huynh's security deposit. After deducting for charges from the security deposit,  
26 defendants returned only \$50.45 to Ms. Huynh. Defendants retained, and continue to  
27 retain, the remaining balance of plaintiff's security deposit.

28 //

**D. AURA MENDIETA**

27. On October 19, 2002, plaintiff Aura Mendieta entered into a written agreement with The Garibaldi Company at the Rancho Luna & Rancho Sol Apartments for rental of apartment 104 in the Rancho Luna section of the complex. Plaintiff was assisted in the execution of the lease agreement by an individual, whom plaintiff is informed and believes was an employee of The Garibaldi Company, who countersigned the lease agreement on behalf of The Garibaldi Company. Pursuant to that agreement, Ms. Mendieta paid \$400 as a security deposit before commencing her tenancy. Under the terms of the agreement, The Garibaldi Company agreed to return the \$400 security deposit by mail within three weeks of the tenants' vacating the unit, less any charges for damage to the premises, fixtures or furnishings, but not including charges for reasonable wear and tear. Pursuant to Civil Code § 1950.5(e), The Garibaldi Company was prohibited by law from assert a claim against the tenant or the security for damages to the premises or any defective conditions that preexisted the tenancy, for ordinary wear and tear or the effects thereof, whether the wear and tear preexisted the tenancy or occurred during the tenancy, or for the cumulative effects of ordinary wear and tear occurring during any one or more tenancies.

28. In giving The Garibaldi Company the \$400 security deposit, Ms. Mendieta reasonably relied on The Garibaldi Company to abide by its representations and the law, including California Civil Code § 1950.5(e), and not to charge her for reasonable wear and tear to the unit.

29. The representation of The Garibaldi Company in the lease agreement that it would not charge Ms. Mendieta for reasonable wear and tear to the unit was false, or made with reckless disregard to its falsity, because The Garibaldi Company intentionally followed a policy and practice of unlawfully charging vacating tenants for reasonable wear and tear to their unit.

30. On September 30, 2005, Ms. Mendieta gave written notice of intent to move out and made a written request for an inspection of her unit prior to her move out.

1 The manager refused to conduct that inspection in accordance with California Civil  
2 Code § 1950.5(f)(1). On October 31, 2005, Ms. Mendieta vacated apartment 104. At  
3 the time that Ms. Mendieta vacated apartment 104, that dwelling had been returned to  
4 the same condition, except for normal wear and tear, and same level of cleanliness as it  
5 was at the inception of her tenancy.

6 31. Nonetheless, defendant unlawfully, and acting in bad faith, charged  
7 \$652.16 for cleaning and damage to apartment 104, deducting that sum from Ms.  
8 Mendieta's security deposit. Defendants retained, and continue to retain, the full  
9 amount of plaintiff's security deposit. Because the charges exceed the amount of the  
10 security deposit, defendants claim that Ms. Mendieta owes defendants \$252.16.  
11 Subsequently, defendants referred that alleged debt to T.A. Ross Collections, which  
12 attempted to collect it from Ms. Mendieta.

13 **E. WILLIAM LABOY**

14 32. On March 30, 2004, plaintiff William Laboy entered into a written  
15 agreement with The Garibaldi Company at the Rancho Luna & Rancho Sol Apartments  
16 for rental of apartment 108 in the Rancho Sol section of the complex. Plaintiff was  
17 assisted in the execution of the lease agreement by an individual, whom plaintiff is  
18 informed and believes was an employee of The Garibaldi Company, who countersigned  
19 the lease agreement on behalf of The Garibaldi Company. Pursuant to that agreement,  
20 Mr. Laboy paid \$400 as a security deposit before commencing his tenancy. Under the  
21 terms of the agreement, The Garibaldi Company agreed to return the \$400 security  
22 deposit by mail within three weeks of the tenants' vacating the unit, less any charges for  
23 damage to the premises, fixtures or furnishings, but not including charges for  
24 reasonable wear and tear. Pursuant to Civil Code § 1950.5(e), The Garibaldi Company  
25 was prohibited by law from assert a claim against the tenant or the security for  
26 damages to the premises or any defective conditions that preexisted the tenancy, for  
27 ordinary wear and tear or the effects thereof, whether the wear and tear preexisted the  
28

1 tenancy or occurred during the tenancy, or for the cumulative effects of ordinary wear  
2 and tear occurring during any one or more tenancies.

3 33. In giving The Garibaldi Company the \$400 security deposit, Mr. Laboy  
4 reasonably relied on The Garibaldi Company to abide by its representations and the  
5 law, including California Civil Code § 1950.5(e), and not to charge him for reasonable  
6 wear and tear to the unit.

7 34. The representation of The Garibaldi Company in the lease agreement  
8 that it would not charge Mr. Laboy for reasonable wear and tear to the unit was false, or  
9 made with reckless disregard to its falsity, because The Garibaldi Company  
10 intentionally followed a policy and practice of unlawfully charging vacating tenants for  
11 reasonable wear and tear to their unit.

12 35. On April 1, 2005, Mr. Laboy vacated apartment 108. Before vacating that  
13 apartment, Mr. Laboy requested an initial inspection by defendant. The purpose of that  
14 inspection was to allow Mr. Laboy the opportunity to remedy deficiencies identified by  
15 defendants in order to avoid deductions from his security deposit. But defendants  
16 failed or refused to conduct that inspection in accordance with California Civil Code §  
17 1950.5(f)(1). At the time that Mr. Laboy vacated apartment 108, that dwelling had been  
18 returned to the same condition, except for normal wear and tear, and the same level of  
19 cleanliness as it was at the inception of his tenancy.

20 36. Nonetheless, defendants unlawfully, and acting in bad faith, charged  
21 \$512.20 for cleaning and damage to apartment 108, deducting that sum from Mr.  
22 Laboy's security deposit. Defendants retained, and continue to retain, the full amount  
23 of plaintiff's security deposit. Because the charges exceed the amount of the security  
24 deposit, defendants claim that Mr. Laboy owes defendants \$112.20 in cleaning and  
25 damages charges.

26 **F. MIGUEL ACOSTA AND CRUZ ACOSTA**

27 37. On February 22, 2002, plaintiffs Miguel and Cruz Acosta entered into a  
28 written lease agreement with The Garibaldi Company at the Rancho Luna & Rancho

1 Sol Apartments for rental of apartment 202 in the Rancho Luna section of the complex.  
2 Plaintiffs were assisted in the execution of the lease agreement by an individual, whom  
3 plaintiffs are informed and believe was an employee of The Garibaldi Company, who  
4 countersigned the lease agreement on behalf of The Garibaldi Company. Pursuant to  
5 the agreement, the Acostas paid \$1,150 as a security deposit before commencing their  
6 tenancy. Under the terms of the agreement, The Garibaldi Company agreed to return  
7 the \$1,150 security deposit by mail within three weeks of the tenants' vacating the unit,  
8 less any charges for damage to the premises, fixtures or furnishings, but not including  
9 charges for reasonable wear and tear. Pursuant to Civil Code § 1950.5(e), The  
10 Garibaldi Company was prohibited by law from assert a claim against the tenant or the  
11 security for damages to the premises or any defective conditions that preexisted the  
12 tenancy, for ordinary wear and tear or the effects thereof, whether the wear and tear  
13 preexisted the tenancy or occurred during the tenancy, or for the cumulative effects of  
14 ordinary wear and tear occurring during any one or more tenancies.

15 38. In giving The Garibaldi Company the \$1,150 security deposit, the Acostas  
16 reasonably relied on The Garibaldi Company to abide by its representations and the  
17 law, including California Civil Code § 1950.5(e), and not to charge them for reasonable  
18 wear and tear to the unit.

19 39. The representation of The Garibaldi Company in the lease agreement  
20 that it would not charge the Acostas for reasonable wear and tear to the unit was false,  
21 or made with reckless disregard to its falsity, because The Garibaldi Company  
22 intentionally followed a policy and practice of unlawfully charging vacating tenants for  
23 reasonable wear and tear to their unit.

24 40. On April 4, 2006, the Acostas vacated apartment 202. At the time that the  
25 Acostas vacated apartment 202, that dwelling had been returned to the same condition,  
26 except for normal wear and tear, and same level of cleanliness as it was at the  
27 inception of their tenancy.

28 //

1           41. Nonetheless, defendant unlawfully, and acting in bad faith, charged the  
2 Acostas \$1,180.43 for cleaning and damage to apartment 202, deducting that sum from  
3 the Acostas' security deposit. Defendants retained the full amount of plaintiffs' security  
4 deposit. Because the charges exceed the amount of the security deposit, defendants  
5 claimed that the Acostas owe defendants \$30.43

6           42. On or about August 20, 2007 (over one year after they vacated their unit),  
7 the Acostas received a check from The Garibaldi Company in the amount of \$848.08,  
8 and a statement to the effect that the accounting of the damages assessed against  
9 their security deposit had been in error. That statement and check were forwarded to  
10 the Acostas only after plaintiffs had initiated a lawsuit.

11                           **G. CUAUHEMOC TORAL AND TERESA VILLEGAS**

12           43. On March 13, 2004, plaintiffs Cuauhtemoc Toral and Teresa Villegas  
13 entered into a written lease agreement with The Garibaldi Company at the Rancho  
14 Luna & Rancho Sol Apartments for rental of apartment 205 in the Rancho Luna section  
15 of the complex. Plaintiffs were assisted in the execution of the lease agreement by an  
16 individual, whom plaintiffs are informed and believe was an employee of The Garibaldi  
17 Company, who countersigned the lease agreement on behalf of The Garibaldi  
18 Company. Pursuant to the agreement, Mr. Toral and Ms. Villegas paid a total security  
19 deposit of \$1,100 in connection with their tenancy. Under the terms of the agreement,  
20 The Garibaldi Company agreed to return the \$1,100 security deposit by mail within  
21 three weeks of the tenants' vacating the unit, less any charges for damage to the  
22 premises, fixtures or furnishings, but not including charges for reasonable wear and  
23 tear. Pursuant to Civil Code § 1950.5(e), The Garibaldi Company was prohibited by law  
24 from assert a claim against the tenant or the security for damages to the premises or  
25 any defective conditions that preexisted the tenancy, for ordinary wear and tear or the  
26 effects thereof, whether the wear and tear preexisted the tenancy or occurred during  
27 the tenancy, or for the cumulative effects of ordinary wear and tear occurring during any  
28 one or more tenancies.

44. In giving The Garibaldi Company the \$1,100 security deposit, Mr. Toral and Ms. Villegas reasonably relied on The Garibaldi Company to abide by its representations and the law, including California Civil Code § 1950.5(e), and not to charge them for reasonable wear and tear to the unit.

45. The representation of The Garibaldi Company in the lease agreement that it would not charge Mr. Toral and Ms. Villegas for reasonable wear and tear to the unit was false, or made with reckless disregard to its falsity, because The Garibaldi Company intentionally followed a policy and practice of unlawfully charging vacating tenants for reasonable wear and tear to their unit.

46. On March 30, 2005, Mr. Villegas and Ms. Villegas vacated apartment 205. Before vacating their apartment, the dwelling had been returned to the same condition, except for normal wear and tear, and same level of cleanliness as it was at the inception of their tenancy.

47. Nonetheless, defendant unlawfully, and acting in bad faith, charged for cleaning and damage to apartment 205, and refused to return any portion of Mr. Toral and Ms. Villegas' security deposit. Defendants retained, and continue to retain, the full amount of plaintiffs' security deposit.

**H. KAPIKA SALAMBUE**

48. On or about August 2, 2004, plaintiff Kapika Salambue entered into a written agreement with The Garibaldi Company at the Rancho Luna & Rancho Sol Apartments for rental of apartment 230 in the Rancho Luna section of the complex. Plaintiff was assisted in the execution of the lease agreement by an individual, whom plaintiff is informed and believes was an employee of The Garibaldi Company, who countersigned the lease agreement on behalf of The Garibaldi Company. Pursuant to that agreement, Ms. Salambue paid \$500 as a security deposit before commencing her tenancy. Under the terms of the agreement, The Garibaldi Company agreed to return the \$500 security deposit by mail within three weeks of the tenants' vacating the unit, less any charges for damage to the premises, fixtures or furnishings, but not including

1 charges for reasonable wear and tear. Pursuant to Civil Code § 1950.5(e), The  
2 Garibaldi Company was prohibited by law from assert a claim against the tenant or the  
3 security for damages to the premises or any defective conditions that preexisted the  
4 tenancy, for ordinary wear and tear or the effects thereof, whether the wear and tear  
5 preexisted the tenancy or occurred during the tenancy, or for the cumulative effects of  
6 ordinary wear and tear occurring during any one or more tenancies.

7 49. In giving The Garibaldi Company the \$500 security deposit, Ms.  
8 Salambue reasonably relied on The Garibaldi Company to abide by its representations  
9 and the law, including California Civil Code § 1950.5(e), and not to charge her for  
10 reasonable wear and tear to the unit.

11 50. The representation of The Garibaldi Company in the lease agreement  
12 that it would not charge Ms. Salambue for reasonable wear and tear to the unit was  
13 false, or made with reckless disregard to its falsity, because The Garibaldi Company  
14 intentionally followed a policy and practice of unlawfully charging vacating tenants for  
15 reasonable wear and tear to their unit.

16 51. On July 13, 2005, Ms. Salambue gave written notice of intent to move.  
17 On August 13, 2005, Ms. Salambue vacated apartment 230. At the time that Ms.  
18 Salambue vacated apartment 230, that dwelling had been returned to the same  
19 condition, except for normal wear and tear, and same level of cleanliness as it was at  
20 the inception of her tenancy.

21 52. Nonetheless, defendant unlawfully, and acting in bad faith, charged  
22 \$1,415.73 for cleaning and damage to apartment 230, deducting that sum from Ms.  
23 Salambue's security deposit. Defendants retained, and continue to retain, the full  
24 amount of plaintiff's security deposit. Because the charges exceed the amount of the  
25 security deposit, defendants claim that Ms. Salambue owes defendants \$915.73.

26 53. Ms. Salambue recently received a communication from T.A. Ross  
27 Collections demanding payment of that \$915.73.

28 //

**I. MARINA DURAN**

54. In December 2001, plaintiff Marina Duran entered into a written agreement with The Garibaldi Company at the Rancho Luna & Rancho Sol Apartments for rental of apartment 119 in the Rancho Luna section of the complex. Plaintiff was assisted in the execution of the lease agreement by an individual, whom plaintiff is informed and believes was an employee of The Garibaldi Company. Pursuant to that agreement, Ms. Duran paid \$99 as a security deposit before commencing her tenancy. Under the terms of the agreement, The Garibaldi Company agreed to return the \$99 security deposit by mail within three weeks of the tenants' vacating the unit, less any charges for damage to the premises, fixtures or furnishings, but not including charges for reasonable wear and tear. Pursuant to Civil Code § 1950.5(e), The Garibaldi Company was prohibited by law from assert a claim against the tenant or the security for damages to the premises or any defective conditions that preexisted the tenancy, for ordinary wear and tear or the effects thereof, whether the wear and tear preexisted the tenancy or occurred during the tenancy, or for the cumulative effects of ordinary wear and tear occurring during any one or more tenancies.

55. In giving The Garibaldi Company the \$99 security deposit, Ms. Duran reasonably relied on The Garibaldi Company to abide by its representations and the law, including California Civil Code § 1950.5(e), and not to charge her for reasonable wear and tear to the unit.

56. The representation of The Garibaldi Company in the lease agreement that it would not charge Ms. Mendieta for reasonable wear and tear to the unit was false, or made with reckless disregard to its falsity, because The Garibaldi Company intentionally followed a policy and practice of unlawfully charging vacating tenants for reasonable wear and tear to their unit.

57. In December 2005, Ms. Duran gave notice and moved out of apartment 119. At the time that Ms. Duran vacated apartment 119, that dwelling had been

1 returned to the same condition, except for normal wear and tear, and same level of  
2 cleanliness as it was at the inception of her tenancy.

3 58. Nonetheless, defendant unlawfully, and acting in bad faith, charged  
4 \$1,084.86 for cleaning and damage to apartment 119, deducting that sum from Ms.  
5 Duran's security deposit. Because the charges exceed the amount of the security  
6 deposit, defendants claimed that Ms. Duran owes defendants \$985.86.

7 59. Thereafter, Ms. Duran received a demand for payment of the \$985.86  
8 from defendants or their agent. She paid that amount for fear of being sent to  
9 collections.

#### 10 **V. CLASS ACTION ALLEGATIONS**

11 60. Class. Plaintiff Edith Macias seeks to bring this case on behalf of herself  
12 and on behalf of a class of similarly situated individuals. Ms. Macias, as class  
13 representative, seeks to represent a class of tenants who have resided at the Rancho  
14 Luna & Rancho Sol Apartments at any time since June 29, 2003, to the present, and  
15 future tenants, who have had, or in the future will have, claims asserted against them or  
16 their security deposits by defendants for alleged damages to units at the Rancho Luna  
17 & Rancho Sol Apartments.

18 61. Commonality. This suit poses questions of law and fact that are common  
19 to and affect the rights of all members of the class. The common questions of law and  
20 fact shared by all class members include, but are not limited to:

- 21 a. Whether defendants had and continue to have a pattern and  
22 practice of arbitrarily and fraudulently deducting portions of all  
23 security deposits required to be returned;
- 24 b. Whether defendants are engaging in and have engaged in  
25 conduct, as a practice, that constitutes an unfair business practice;
- 26 c. Whether defendants have a practice of failing to comply with  
27 Civil Code § 1950.5; and  
28

1 d. Whether defendants have acted with malice, oppression and  
2 fraud entitling plaintiffs to punitive damages.

3 62. Typicality. The claims of the lass representative are typical of the claims  
4 of class members as a whole, because defendants have implemented and pursued a  
5 policy or practice of unlawfully asserting claims against class members or their security  
6 deposits for alleged damages to units at the Rancho Luna & Rancho Sol Apartments  
7 that preexisted their tenancy or consisted of ordinary wear and tear during the tenancy,  
8 or to clean the premises beyond the same level of cleanliness it was in at the inception  
9 of the tenancy. The experience of class representative Edith Macias, as alleged in  
10 paragraphs 17-21 above, is typical of the experience of members of the plaintiff class.

11 63. Numerosity. The number of members of the class on whose behalf  
12 plaintiff sues is unknown, but it is estimated to be so numerous that joinder of all such  
13 members is impracticable. The number of persons possibly affected by defendants'  
14 unlawful policies and practices is indeterminate, but it is larger than can be addressed  
15 by joinder.

16 64. Superiority. A class action is superior to other available methods for the  
17 fair and efficient adjudication of the controversy of the claims of the class plaintiffs. The  
18 damages suffered by the individual class members, although not inconsequential, may  
19 be relatively small and the expense and burden of individual litigation for each class  
20 member makes it impractical for class members to seek individual redress for the  
21 wrongful conduct alleged herein. In addition, the prosecution of separate actions would  
22 create risk of inconsistent rulings, which may harm the interests of individual class  
23 members who are not parties to the adjudications and/or may substantially impeded  
24 their ability to protect their interests.

25 65. Adequacy of Representation. Plaintiff will fairly and adequately protect  
26 the interests of the class because plaintiff's counsel possesses the requisite resources  
27 and ability to prosecute this action and because the class representative's interests are  
28 consistent with the interests of the class.

1 **VI. CAUSES OF ACTION**

2 **A. FIRST CAUSE OF ACTION**

3 **[Civil Code § 1950.5]**

4 ***All Plaintiffs and the Plaintiff Class v. All Defendants***

5 66. Plaintiffs and the plaintiff class reallege and incorporate by reference all  
6 previous paragraphs alleged in the complaint herein.

7 67. Defendants' course of conduct described above injured plaintiffs and the  
8 members of the plaintiff class who have vacated the complex by failing to comply with  
9 the requirements of Civil Code § 1950.5, making defendants liable for actual damages.

10 68. Defendants acted in bad faith towards plaintiffs and the members of the  
11 plaintiff class who have vacated the complex within the meaning of Civil Code §  
12 1950.5(l), entitling plaintiffs and those members of the plaintiff class to damages of up  
13 to twice the amount of their security deposits, in addition to actual damages.

14 69. Defendants acted with oppression, fraud and malice in engaging in the  
15 business practices described above, such that plaintiffs and those members of the  
16 plaintiff class are entitled to punitive damages in an amount to be established at trial.  
17 ongoing.

18 **B. SECOND CAUSE OF ACTION**

19 **[California Unfair Business Practices]**

20 ***All Plaintiffs and the Plaintiff Class v. All Defendants***

21 70. Plaintiffs and the plaintiff class reallege and incorporate by reference all  
22 previous paragraphs alleged in the complaint herein.

23 71. In acting as herein alleged, defendants have engaged in a pattern or  
24 practice of unlawful and unfair conduct in the operation of the Rancho Luna & Rancho  
25 Sol Apartments, and therefore have engaged in acts of unfair competition as the same  
26 is defined in California Business and Professions Code § 17200, et seq.

27 72. The acts of unfair competition in which defendants have engaged include,  
28 but are not limited to, violating Civil Code § 1950.5 governing the return and retention of

1 security deposits, and by engaging in unfair policies and practices with respect to  
2 making claims against vacating tenants and vacating tenants' security deposits for  
3 alleged damage to their units.

4 73. In bringing this action, plaintiffs and the plaintiff class are acting in the  
5 interest of themselves and the general public pursuant to the California Business and  
6 Professions Code § 17204.

7 74. Plaintiffs and the plaintiff class seek injunctive relief ordering defendants  
8 to stop their unlawful practices and restitution of the security deposits wrongfully  
9 withheld and the charges unlawfully assessed against them by defendants.

### 10 C. THIRD CAUSE OF ACTION

#### 11 [Fraud]

#### 12 *All Plaintiffs and the Plaintiff Class v. All Defendants*

13 75. Plaintiffs and the plaintiff class reallege and incorporate by reference all  
14 previous paragraphs alleged in the complaint herein.

15 76. As alleged above in paragraphs 17-59 and incorporated herein, defendant  
16 Mark Garibaldi, doing business as The Garibaldi Company, has engaged in a practice  
17 of making false representations to plaintiffs and members of the plaintiff class with  
18 respect to the return of their security deposits. Defendant and his agents knew that  
19 those representations were false, or acted with reckless disregard as to their falsity.

20 77. By making those misrepresentations, defendant and his agents intended  
21 to induce plaintiffs and the plaintiff class to entrust defendant with their security  
22 deposits. Plaintiffs and the plaintiff class justifiably relied upon those  
23 misrepresentations.

24 78. As a result of defendants' wrongful conduct, plaintiffs and the members of  
25 the plaintiff class who have vacated the complex have suffered and continue to suffer  
26 economic losses, and other general and specific damages, all in an amount to be  
27 determined according to proof at the time of trial.

28

1           79. In doing those unlawful acts and making those representations, defendant  
2 Mark Garibaldi, doing business as The Garibaldi Company, was acting as the agent of  
3 Thomas J. Tomanek within the scope of his agency, thus making Thomas J. Tomanek  
4 vicariously liable for that conduct as principal.

5           80. Defendants acted with oppression, fraud and malice in engaging in the  
6 business practices described above, such that plaintiffs and the plaintiff class are  
7 entitled to punitive damages in an amount to be established at trial.

8           81. Defendant Thomas J. Tomanek, as principal, is vicariously liable for the  
9 fraudulent acts of its agent, Mark Garibaldi, doing business as The Garibaldi Company,  
10 conducted in the course of their agency relationship, and for all compensatory damages  
11 awarded by the jury. Thomas J. Tomanek, as owner of the Rancho Luna & Rancho  
12 Sol Apartments, knew or should have known of the fraudulent conduct of its agent Mark  
13 Garibaldi, doing business as The Garibaldi Company, but continued to employ him to  
14 manage the Rancho Luna & Rancho Sol Apartments, thus making Thomas J. Tomanek  
15 vicariously liable for punitive damages.

#### 16                                   D. FOURTH CAUSE OF ACTION

#### 17   [UNJUST ENRICHMENT]

#### 18   *All Plaintiffs and the Plaintiff Class v. All Defendants*

19           82. Plaintiffs reallege and incorporate by reference all previous paragraphs  
20 alleged in the complaint herein.

21           83. In making unlawful claims against the security deposits of plaintiffs and  
22 the plaintiff class, defendants unjustly obtained a benefit from plaintiffs in the form of  
23 payments neither due nor owing, which defendants retained. Defendants accepted and  
24 has retained those payments from plaintiffs for their own use, unjustly depriving  
25 plaintiffs of those funds. Allowing defendants to retain those benefits would be  
26 inequitable. Those benefits belong, in equity and good conscience, to plaintiffs.

27           84. Accordingly, plaintiffs and the plaintiff class pray for an order of this Court  
28 directing defendants to disgorge all profits, benefits and other compensation obtained

1 by defendants from plaintiff and the plaintiff class by their unlawful conduct, and  
 2 imposing a constructive trust thereon.

### 3 E. FIFTH CAUSE OF ACTION

#### 4 [DEFAMATION]

5 *Plaintiffs Edith Macias, Hoton Duran, Aura Mendieta*  
 6 *and Kapika Salambue v. All Defendants*

7 85. Plaintiffs Edith Macias, Hoton Duran, Aura Mendieta and Kapika  
 8 Salambue reallege and incorporate by reference all previous paragraphs alleged in the  
 9 complaint herein.

10 86. In or about July 2006, defendants defamed plaintiff Edith Macias and  
 11 plaintiff Hoton Duran and plaintiff Aura Mendieta by communicating to T.A. Ross  
 12 Collections that each refused to pay a just debt, and authorizing T.A. Ross Collections  
 13 to commence collection efforts against them. At some time within the applicable statute  
 14 of limitations, at a time currently unknown to plaintiffs, defendants defamed plaintiff  
 15 Kapika Salambue by communicating to T.A. Ross Collections that she refused to pay a  
 16 just debt, and authorizing T.A. Ross Collections to commence collection efforts against  
 17 her. Those alleged debts were not just debts, in that they were the result of defendants'  
 18 unlawful pattern and practice of withholding tenants' security deposits and making  
 19 unlawful claims against those deposits, as set forth herein. Each of those  
 20 communications was defamatory on its face, causing damage to plaintiffs' credit  
 21 ratings, and causing them to suffer general and special damages to be proved at trial.

#### 22 VII. RELIEF

23 Wherefore, plaintiffs and all class members pray for the following relief against  
 24 defendants:

- 25 1. That the classes described above be certified in this action pursuant to
- 26 Code of Civil Procedure 382;
- 27 2. For an order declaring unlawful defendants' pattern and practices
- 28 complained of herein;

3. For an order enjoining all unlawful practices complained about herein;
  4. For an order requiring defendants to make restitution to plaintiffs and the plaintiff class;
  5. For an order awarding actual or compensatory damages to plaintiffs and the plaintiff class according to proof;
  6. For an order awarding statutory damages to plaintiffs and the plaintiff class according to proof;
  7. For an order awarding punitive damages to plaintiffs and the plaintiff class according to proof;
  8. For an order requiring defendants to disgorge their profits and benefits obtained unjustly from plaintiffs and the plaintiff class, together with statutory interest thereon, and imposing a constructive trust thereon;
  9. For costs of suit, including reasonable attorneys' fees pursuant to Code of Civil Procedure § 1021.5; and,
  10. For all such other relief as the Court deems just.
- Dated: January 17, 2008.

Respectfully submitted,

BRANCART & BRANCART

  
Elizabeth Brancart  
Attorneys for Plaintiffs

**VIII. JURY DEMAND**

Plaintiffs and the plaintiff class hereby request a jury trial.

Dated: January 17, 2008.

Respectfully submitted,

BRANCART & BRANCART

  
\_\_\_\_\_  
Elizabeth Brancart  
Attorneys for Plaintiffs